(b) Nothing in this subsection shall affect section 111 of the Evidence Act, 1950."

(3) As regards the objection that the Sale Agreement was different from what the defendant had agreed to execute, it has to be noted that the Sale Agreement was executed three days after a draft was prepared during negotiations. The Sale Agreement was read and the defendant's signature was attested by his own solicitor and the defendant cannot now go back and say he did not understand the contents nor that he did not agree to the terms.

(4) As to the last objection that the agreement is not capable of being specifically enforced against the plaintiff I find there is no merit in this. The agreement expressly provides that the plaintiff shall give $1\frac{3}{4}$ houses to the defendant of every ten houses or $17\frac{1}{2}\%$ of the market value of ten houses. So the alternative can be specifically enforced and need not involve continuous supervision by the courts.

Here as I stated earlier the plaintiff has performed as much of the contract as it could before the vendor transfers the said land. The defendant has accepted even the sum of $400,000 without protest or argument and enjoyed the benefits of it. As was stated in the case of *Anglesey (Earl)* v. *Annesley*[1]

"If an agreement is part performed by one of the parties, it is too late for the other to complain of fraud, surprise, etc., or attempt to set the agreement aside on that account; for a court of equity will decree specific performance of the remaining part of it."

It would therefore be unconscionable to accept his defence as a *bona fide* defence and have the case go to trial. It is just a sham defence to help the defendant avoid having to perform his part of the contract.

Under the circumstances and for reasons given above there will be judgment for the plaintiff in terms of the minutes annexed to the summons-in-chambers.

Application allowed.

Solicitors: *G.T. Rajan & Co.; Adam & Co.*

NG MOO YIN & ANOR. v. NG CHEE KONG & ANOR.

[O.C.J. (Arulanandom J.) September 24 & December 8, 1980; February 23, 1981 & April 27, 1981]

[Penang — Originating Motion No. 29 of 1980]

Practice and Procedure — Trust — Ex parte application for appointment as trustees — Order granted — No notice to other beneficiaries — Order set aside.

Estate and Trust — Trust — Appointment as trustees by ex parte application — No notice to other beneficiaries — Order set aside.

This was an application to set aside the Order of Court dated June 1, 1979 in Originating Summons No. 164 of 1979 appointing the respondents as trustees of the Estate of Ng Teik Thye (deceased). The said Order was made pursuant to an *ex parte* application by the respondents to be appointed trustees in place of the last surviving trustee of the said Estate.

Held, setting aside the Order: in spite of the fact that there were many other beneficiaries, the application of the respondents was made *ex parte* without notice being given to all other beneficiaries who had a right to be heard on the application. On this score itself, the applicants had a right to set aside the Order obtained *ex debito justitiae.*

ORIGINATING MOTION.

N.T. Vello for the applicants.

Goh Lim Eam for the respondents.

Arulanandom J.: This was an application by the applicants to set aside the Order of Court dated June 1, 1979 in Originating Summons No. 164 of 1979 appointing the respondents as trustees of the Estate of Ng Teik Thye (deceased).

The said Order was made pursuant to an *ex parte* application by the respondents to be appointed trustees in place of the last surviving trustee of the Estate of Ng Teik Thye (deceased) viz. Ng Kok Chan who died intestate on December 1, 1978.

Various allegations are made against the respondents in the affidavit of the applicants in support of the application. But these need not be considered here. The fact remains that in spite of the fact there were many other beneficiaries, the application of the respondents was made *ex parte* without notice being given to all other beneficiaries who had a right to be heard on the application. On this score itself the applicants have a right to set aside the Order obtained *ex debito justitiae.*

The court therefore set aside the Order dated June 1, 1979 in Originating Summons No. 164 of 1979 with costs.

Order accordingly.

Solicitors: *Chang & Vello; Goh Lim Eam & Co.*

HONG KEOW TEE & ANOR. v. ALKHARED & KHOO HOLDINGS SDN. BHD.

[O.C.J. (Arulanandom J.) April 21, 1980 & April 29, 1981]

[Penang — Originating Motion No. 6 of 1980]

Land Law — Caveat — Removal of Caveat — Effect of — National Land Code, s. 326(2).

On the strength of an agreement dated March 17, 1978 for the applicants to provide the pieces of land for the purpose of constructing and erecting dwelling houses, the respondents had lodged a caveat against the said land (hereinafter referred to at the first caveat). On October 18, 1979, the applicants caused a notice in Form 190 of the National Land Code to be served on the respondents for the removal of the first caveat. The respondents promptly applied by an *ex parte* Originating Summons dated November 9, 1979, for an extension of the said first caveat and on November 22, 1979, the said caveat was extended under section 326(2) of the National Land Code. However, the respondents had failed to serve the relevant order on the Registrar, as required by the provisions of section 326(2). The caveat was accordingly removed after the period allowed by the notice in Form 19C. When the respondents realized that this had happened they immediately caused a further caveat, No. 2310/79 (the subject matter of this application), to be lodged against the said pieces of land.

The question before the court was whether the respondents were entitled to lodge the second caveat (No. 2310/79) when the first had been removed.

Held, allowing the application: (1) once a caveat is removed, the removal is conclusive and it is extinguished forever;

(2) the caveat (No. 2310/79) should be removed forthwith.

Cases referred to:-

(1) *Damodaran* v. *Vasudeva* [1974] 1 M.L.J. 128, 129 & 130.

(2) *Arul Chandran* v. *Tara Rajaratnam* [1979] 2 M.L.J. 172, 174.